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IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

RIEDEL PRODUCTS CORPORATION, INC.

and

JAMES RIVER CORPORATION OF VIRGINIA,
Petitioners,

v.

JOSEPH W. MEYER,
Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

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of Virginia*

QUESTIONS PRESENTED FOR REVIEW

1. Whether the filing period of the Age Discrimination in Employment Act of 1967 may be equitably tolled on the ground that the plaintiff was misled as to the reason for his discharge.

2. Whether the filing period of the Age Discrimination in Employment Act of 1967 may be equitably tolled where, within the time allowed for filing, the plaintiff was aware of the Act, suspected he was discriminated against, and consulted an attorney.

PARTIES

The caption of this Petition contains the names of all parties to this action. James River Corporation of Virginia has no parent company. Riegel Products Corporation, Inc., is a wholly-owned subsidiary of James River Corporation of Virginia. Other than wholly-owned subsidiaries, James River Corporation of Virginia has an ownership interest in the following companies: Carolina Kraft, Inc.; James River-Marathon, Ltd.; James River-Marathon Pulp Sales, Ltd.; James River-Pepperell, Inc.; and Nashua River Reservoir Company.

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**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
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Riegel Products Corporation, Inc., and James River Corporation of Virginia respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit entered in this case.¹

OPINIONS BELOW

The transcript of the oral opinion of the United States District Court for New Jersey, which was entered on

¹ The United States Court of Appeals for the Third Circuit is hereafter referred to as the Court of Appeals or the Third Circuit.

May 24, 1982, is attached to this Petition as Appendix A. The unreported memorandum opinion of the United States District Court which was entered on September 30, 1982, is attached as Appendix B. The opinion of the United States Court of Appeals for the Third Circuit, attached as Appendix C, is reported at 720 F.2d 303 (3rd Cir. 1983).

JURISDICTION

The judgment of the Third Circuit was entered on November 2, 1983. A timely petition for rehearing and suggestion for rehearing *in banc* was filed on November 16, 1983, and was denied by the Third Circuit in an order dated November 29, 1983, attached as Appendix D. On December 5, 1983, Petitioners moved the Third Circuit for a stay pending the filing of this Petition. The Third Circuit granted the motion and stayed its mandate until January 6, 1984, in an order dated December 16, 1983, attached as Appendix E. Jurisdiction over this Petition, filed with this Court on January 6, 1984, exists pursuant to sections 1254(1) and 2101(c) of Title 28 of the United States Code.

STATUTE INVOLVED

29 U.S.C. § 626(d) (1978):

(d) No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Secretary. Such a charge shall be filed—

(1) within 180 days after the alleged unlawful practice occurred; or

(2) in a case to which section 633(b) of this title applies, within 300 days after the alleged unlawful practice occurred or within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.

Upon receiving such a charge, the Secretary shall promptly notify all persons named in such charge as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.

STATEMENT OF THE CASE

(a) Facts

Respondent Joseph W. Meyer ("Meyer") brought this action under the Age Discrimination in Employment Act of 1967 ("ADEA") in the United States District Court for the District of New Jersey on January 7, 1980. He alleged that Riegel Products Corporation ("Riegel") and James River Corporation of Virginia ("James River"), Riegel's parent corporation, terminated his employment because of his age and hired a younger man to assume most of his responsibilities.

The undisputed facts in the record² show that Riegel informed Meyer not later than November 11, 1977, that it had decided to terminate his employment.³ From that day on, Meyer believed he was being terminated because of his age.⁴ Meyer's last day of employment was two weeks later, on November 25, 1977.⁵

On May 25, 1978, 195 days after Meyer was told of Riegel's decision to terminate him and 181 days from his last day of employment with Riegel, Meyer's lawyer, Michael S. Gordon ("Gordon"), filed an age discrimination charge with the state of New Jersey, Department of Law and Public Safety, Division on Civil Rights

² Citations to the record before the Court of Appeals are cited as "R. —".

³ R. 79-84, 137; Appendix C, at 7a.

⁴ R. 81-86, 137; Appendix C, at 7a.

⁵ R. 7, 18; Appendix C, at 7a.

("New Jersey Division on Civil Rights").⁶ Gordon admits that he intended to file a charge of discrimination with the New Jersey Division on Civil Rights within 180 days after Meyer's termination, but failed to do so solely because of "inadvertent mechanical or clerical error or misunderstanding" that occurred in his law offices.⁷

Similarly, on September 22, 1978, 315 days after Meyer was told of Riegel's decision to terminate him and 301 days after his last day of employment, Gordon mailed a charge of age discrimination to the United States Department of Labor.⁸ This charge was received by the Department of Labor on September 26, 1978.⁹ Again Gordon admits that he intended to file a charge of discrimination with the Department of Labor within 300 days after Meyer's termination, but failed to do so solely because of "inadvertent mechanical or clerical error or misunderstanding" in his law offices.¹⁰

In response to the complaint filed in the District Court, on March 24, 1982, Riegel and James River filed a motion to dismiss and/or for summary judgment on the merits and on the ground that Meyer did not file a timely charge of discrimination with the Department of Labor before commencing this suit. On May 24, 1982, the District Court heard argument and considered affidavits and transcripts of discovery depositions submitted by the parties. Meyer did not seriously dispute that his filing with the Department of Labor was late or that the late filing was due to law office error. Instead, Meyer argued that the limitations period should be equitably tolled on the ground that Riegel fraudulently concealed the reasons for his discharge.

⁶ R. 8-9; Appendix C, at 8a.

⁷ R. 44-46.

⁸ R. 8; Appendix C, at 9a.

⁹ R. 62; Appendix C, at 9a.

¹⁰ R. 46-48.

(b) Meyer's Allegations In Support of Equitable Tolling

Meyer relied on two assertions as the basis for his claim of tolling: (1) Riegel told him in a letter of January 13, 1978, "Your employment with Riegel Products Corporation was terminated on November 25, 1977 when the Engineering Department was reorganized due to the acquisition of Riegel Products Corporation by the James River Corporation".¹¹ Meyer alleged that this statement concealed a discriminatory reason for Meyer's discharge, i.e., his age. (2) Riegel did not tell Meyer that it received an application on January 12, 1978, from an applicant younger than Meyer and that on February 13, 1978, Riegel hired this applicant to perform certain of Meyer's former duties.¹²

Meyer claimed no misrepresentation about his employment status or the fact that he received a final notice of termination on November 11, 1977.

(c) Meyer's Admissions in the Record With Respect to His Claim of Equitable Tolling

Meyer admitted that he was suspicious of age discrimination when he was informed of his discharge.¹³ Meyer stated in his affidavit that after receiving the January 13 letter he was "highly suspicious" that he had been discharged because of his age.¹⁴ In "late January, 1978"

¹¹ R. 148.

¹² R. 7. Meyer also argued that Riegel's response to the New Jersey Division on Civil Rights showed that the January 13 letter was deceptive since the response stated that the major factor that caused Meyer's discharge during the 1977 reorganization was his poor job performance, but poor performance had not been mentioned in the January 13 letter. R. 173. The Court of Appeals concluded that this might be evidence of an intention to conceal but was not a basis for tolling itself since it came after Meyer filed his charge. Appendix C, at 12a.

¹³ R. 81-86, 137.

¹⁴ R. 139.

Meyer consulted attorney Gordon about his suspicion that he had been a victim of age discrimination. According to the affidavits of Meyer and Gordon, they concluded that they did not yet have sufficient "convincing evidence" of age discrimination to file a charge with the Department of Labor or the state agency.¹⁵

Gordon advised Meyer that it was doubtful that he could make out a prima facie case of age discrimination and that his "suspicions, speculations, and subjective interpretations" of Riegel's record in laying-off employees were not enough on which to base an age discrimination claim.¹⁶ Gordon told Meyer that he needed "real evidence of age discrimination" before he could recommend that Meyer file any kind of complaint with the federal or state agencies enforcing age discrimination laws. Gordon suggested that Meyer try to discover further evidence bearing on his suspicions, and that if he discovered any, to bring it to his attention immediately. In the meantime, Gordon gave Meyer's pension concerns priority.¹⁷

There were no subsequent inquiries by Meyer or Gordon to Riegel about the reasons for Meyer's termination, nor any efforts to determine who had assumed his duties following the reorganization. Around May 1, 1978, a Riegel employee showed Meyer a newspaper article about the employee who had assumed some of Meyer's former duties in February 1978.¹⁸ Meyer allegedly considered this to be the additional evidence for which he had been waiting, and brought this information to his attorney's attention on May 12, 1978.¹⁹ Attorney Gordon filed a charge of discrimination with the state agency on May 25, 1978,

¹⁵ R. 140, 254-55.

¹⁶ R. 255.

¹⁷ *Id.*

¹⁸ R. 141.

¹⁹ *Id.*

and waited another four months before filing a charge with the Department of Labor. Gordon admits that he inadvertently delayed filing the charge until after the limitation period had run.²⁰

(d) Decisions Below

Since Meyer did not contest that his charge was filed with the Department of Labor more than 300 days after the date he received notice of his discharge and more than 300 days after the date of his discharge, the primary issue before the District Court on summary judgment was whether the filing period should be equitably tolled. On the basis of the verified complaint, the affidavits and the depositions submitted by the parties, the District Court held, "There is no dispute about the facts upon which the plaintiff relies for equitable tolling. Those facts show no legal basis for equitable tolling for the filing period."²¹ The District Court found that:

Mr. Meyer's own statements in his verified complaint, in his affidavits, in his deposition, consistently [show] that he felt he had been the subject of age discrimination . . . from the day he was told that he was to be terminated effective November 25.

Whatever value there may be in delaying filing until more is learned in order to have a stronger claim, this [course] can only be safely pursued in light of the time limits, which, to be prudent, should be calculated with care and conservatively.

Filing on what is thought to be the last day is always risky. The calculation may be wrong, as it was here.

Any other view of the circumstances would imply that time does not start to run until the claimant has successfully gathered all the facts he believes will

²⁰ R. 256-57.

²¹ Appendix A, at 2a.

prove his case. This would not only destroy the significance of a time limit, but would allow the time to run indefinitely at a pace measured by the plaintiff's diligence and success.

Discovery is a process which follows charges rather than precedes them. The filing was well out of time. The factual details provide no support for equitable tolling.²²

The District Court therefore held on the basis of the undisputed facts in the record that there were no grounds for equitable tolling and dismissed Meyer's tardy claim of age discrimination.

The Court of Appeals reversed, holding that summary judgment should not have been granted because there were material facts in dispute on the question of equitable tolling. The Court of Appeals concluded that Riegel's January 13 letter and Riegel's failure to disclose to Meyer that it was considering a younger applicant for some of Meyer's former duties may have been part of a scheme to mislead Meyer about the reason for his discharge and thus may have delayed Meyer's filing of a charge. Drawing from dicta in previous cases that equitable tolling could be appropriate where "the defendant has actively misled the plaintiff respecting the cause of action",²³ the Court of Appeals found that intentional concealment of the reasons for Meyer's discharge, if proved, would support equitable tolling.²⁴

The Court of Appeals further held that Meyer's contemporaneous suspicion of age discrimination and his contact with an attorney did not preclude equitable toll-

²² Appendix A, at 2a.

²³ See *School District of Allentown v. Marshall*, 657 F.2d 16, 20 (3rd Cir. 1981).

²⁴ Appendix C, at 11a-13a.

ing, on the premise that despite their admitted suspicion of age discrimination, the alleged misrepresentation or concealment may have misled both Meyer and his attorney about whether Meyer had in fact been discriminated against.²⁵

The Court of Appeals remanded the case for trial on the merits of Meyer's claim and on the question whether any misrepresentation or omission of Riegel had an "important effect" in causing Meyer to postpone filing his charge with the Department of Labor.²⁶

REASONS FOR GRANTING THE WRIT

The District Court correctly found that, under the undisputed admissions in the depositions and affidavits of Meyer and his attorney, there was no basis for a finding that Riegel had done anything to prevent Meyer from filing a timely charge. Moreover, under the undisputed facts, Meyer was not misled by Riegel since he believed he had been discriminated against and took action to pursue his claim by contacting his attorney.²⁷

The Third Circuit has expanded the doctrine of equitable tolling to the extent that it has rendered meaningless the limitation periods of the ADEA. The decision conflicts with the principles laid down by this Court in other employment discrimination cases, and has created a conflict among the circuits by holding that the limitations period may be tolled even though the plaintiff consulted a lawyer within the statutory period for filing.

²⁵ Appendix C, at 15a-16a.

²⁶ Appendix C, at 16a.

²⁷ Meyer's conclusory allegation that he and Gordon were misled does not create a genuine issue of fact since the allegation is contradicted by his own affidavits and depositions. *Woods v. Allied Concord Financial Corp.*, 373 F.2d 733, 734 (5th Cir. 1967).

(a) The Issue of Equitable Tolling Under the Age Discrimination in Employment Act, Which This Court Has Never Settled, Is of Extraordinary Importance to the Law of Employment Discrimination

The ADEA, like Title VII,²⁸ requires that a timely charge of discrimination be filed before a civil action can be initiated. With respect to actions under Title VII, this Court has held that "[t]he limitations periods, while guaranteeing the protection of the civil rights laws to those who promptly assert their rights, also protect employers from the burden of defending claims arising from employment decisions that are long past." *Delaware State College v. Ricks*.²⁹ Recently the Court held that the filing requirement under Title VII is not a jurisdictional prerequisite to litigation but is "a requirement that, like a statute of limitations, is subject to waiver, estoppel and equitable tolling." *Zipes v. Trans World Airlines, Inc.*³⁰ The Court has not, however, directly addressed the circumstances under which equitable tolling is appropriate, nor has it provided definite guidelines for its application in an age discrimination case.

Faced with the specific statutory time limits for filing their claims, untimely ADEA plaintiffs increasingly have asserted claims of equitable tolling to avoid dismissal. Courts have found grounds for equitable tolling in cases where the employer has failed to post the required notice of statutory rights,³¹ where the employer has led the plaintiff to believe that the employment decision was not final,³² or where the employer has expressly encouraged

²⁸ Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq.

²⁹ 449 U.S. 250, 256-57 (1980).

³⁰ 455 U.S. 385, 393 (1982).

³¹ See *Bonham v. Dresser Industries, Inc.*, 569 F.2d 187 (3rd Cir. 1977), cert. denied, 439 U.S. 821 (1978).

³² See *Coke v. General Adjustment Bureau, Inc.*, 640 F.2d 584 (5th Cir. 1981).

the employee to delay filing a charge in order to reach a private settlement.³³ None of these factors are present here.

This case, as the Court of Appeals acknowledged, "requires [the Court] to clarify a critical question concerning the doctrine of equitable tolling in a case charging a violation of the Age Discrimination in Employment Act."³⁴ Riegel urges that a writ of certiorari should be granted under Rule 17.1(c) of the Rules of this Court, since the Court of Appeals decided an important question of federal law which has not been, but should be, settled by this Court.

The significance of the Court of Appeals' decision is readily apparent because it so intertwines the concept of tolling with the merits of the claim of discrimination that the statute will be tolled in almost every case unless the employer prevails on the merits. Under the Court of Appeals' holding, the trial court must determine whether the reason given by Riegel for Meyer's discharge was the truth or a pretext, as well as whether Meyer relied on Riegel's representation. With this standard, a tardy plaintiff need only allege that the employer, in stating a reason for his or her discharge, did not reveal that it was the result of a discriminatory motive. Since the *sine qua non* of an ADEA action is an allegation that the defendant employer discharged the plaintiff because of age, the employer could avoid equitable tolling only by prevailing on the merits. The employer would have to establish that its nondiscriminatory explanation did not deceive the plaintiff because the discharge *in fact* was nondiscriminatory.

If the Third Circuit's reasoning is correct, an employer can only retain the protection of the limitations period by

³³ See *Leake v. University of Cincinnati*, 605 F.2d 255 (6th Cir. 1979).

³⁴ Appendix C, at 6a.

telling all terminated employees that their age was the reason for their discharge. Otherwise, there would always be the basis for an allegation of concealment or deception by the employer as to the real, discriminatory reason for the discharge.³⁵

The dangers inherent in the decision of the Court of Appeals are illustrated by the case of *Wilkerson v. Siegfried Insurance Agency, Inc.*³⁶ In *Wilkerson*, the District Court dismissed an ADEA and Title VII complaint for failure to comply with the timely filing requirements. The Tenth Circuit reversed and remanded for a determination whether the limitation period should be tolled because Wilkerson was misled by her employer about the reasons for her discharge. On remand, the District Court found that there should be no tolling because Wilkerson was in fact terminated for the reasons her employer gave, and that these reasons were not a pretext for discrimination. Wilkerson again appealed to the Tenth Circuit, which affirmed, finding that "[t]he evidence is overwhelming that the termination of Wilkerson was motivated in order to reduce overhead costs and to centralize standard accounting procedures. Wilkerson's termination on March 14, 1975, was not motivated by age or sex discrimination."³⁷ The obvious result in *Wilkerson*, therefore, was that the limitations period established by Congress provided the employer no protection from having to defend against plaintiff's stale claim on the merits.

This Court has admonished that "strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the

³⁵ This, of course, would still leave the employer open to claims that it had concealed some other discriminatory reason for the discharge, such as race or sex.

³⁶ 683 F.2d 344 (10th Cir. 1982).

³⁷ 683 F.2d at 347.

law.”³⁸ In almost every discrimination case based on allegations of disparate treatment, the ultimate issue is whether the employer’s purported nondiscriminatory reason for the employment action is really a pretext. Without further guidance from this Court, the Third Circuit’s rationale will render the limitations period established by Congress for filing charges of discrimination meaningless, and employers will inevitably be required to litigate stale discrimination claims on the merits in order to overcome allegations of equitable tolling.

(b) The Decision of the Third Circuit Conflicts With the Decisions of Other Circuits

Rule 17.1(a) of the Rules of this Court provides that a consideration in favor of granting a writ of certiorari is that the decision of the court below is “in conflict with the decision of another federal court of appeals on the same matter.” The decision of the Third Circuit conflicts with the decisions of the Second, Fourth, Fifth, and Seventh Circuits.³⁹ This Court should grant a writ of certiorari to resolve this important conflict.

This Court recognized in *Love v. Pullman Co.*⁴⁰ that a technical reading of statutory filing provisions would be “particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process.” Thus, Courts of Appeals have approved equitable tolling where a plaintiff, unassisted by an attorney, has failed to comply with a limitations period.⁴¹ However, the Courts of Appeals have consistently rejected tolling

³⁸ *Mohasco Corp. v. Silver*, 447 U.S. 807, 826 (1980).

³⁹ See note 42, *infra*.

⁴⁰ 404 U.S. 522, 527 (1972).

⁴¹ See, e.g., *Coke v. General Adjustment Bureau, Inc.*, 640 F.2d 584, 588 (5th Cir. 1981).

arguments in cases where plaintiffs have consulted attorneys within the limitations period.⁴²

The Court of Appeals for the Second Circuit has pointed out, for example, that when one has retained counsel within the period in question, he has "access to the means of acquiring knowledge of his rights and responsibilities."⁴³ As the Fifth Circuit expressed the rule:

While it may be inequitable to allow an employer to benefit from his own wrong, it would be at least equally unfair to hold that the employer is estopped from raising the 180-day bar where the injured employee consulted an attorney who either slept on his client's rights or did not believe he had any under the statute.⁴⁴

The Third Circuit here, however, applied equitable tolling despite the undisputed fact that Meyer consulted an attorney well within the time for filing. Meyer chose, in late January 1978, to go to an attorney with his suspicion of age discrimination rather than to the Department of Labor. Had he gone to the Department of Labor, his charge would have been timely. Meyer "voluntarily chose his attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omis-

⁴² See, e.g., *Vance v. Whirlpool Corp.*, 716 F.2d 1010 (4th Cir. 1983); *Keyse v. California Texas Oil Corp.*, 590 F.2d 45, 47 (2nd Cir. 1978); *Kephart v. Institute of Gas Technology*, 581 F.2d 1287, 1289 (7th Cir. 1978); *Smith v. American President Lines, Ltd.*, 571 F.2d 102, 109-10 (2nd Cir. 1978); *Edwards v. Kaiser Aluminum & Chemical Sales, Inc.*, 515 F.2d 1195, 1200 (5th Cir. 1975). See also *Kocian v. Getty Refining & Marketing Co.*, 707 F.2d 748 (3rd Cir.), cert. denied, — U.S. —, 104 S. Ct. 164 (1983); *Bronze Shields, Inc. v. N. J. Department of Civil Services*, 667 F.2d 1074, 1085 (3rd Cir. 1981), cert. denied, 458 U.S. 1122 (1982); and *Bonham v. Dresser Industries, Inc.*, 569 F.2d 187, 193 (3rd Cir. 1977), cert. denied, 439 U.S. 821 (1978).

⁴³ *Smith v. American President Lines, Ltd.*, 571 F.2d 102, 109 (2nd Cir. 1968).

⁴⁴ *Edwards v. Kaiser Aluminum & Chemical Sales, Inc.*, 575 F.2d 1195, 1200 (5th Cir. 1975).

sions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation" ⁴⁵

The Court of Appeals attempts to distinguish this case on the basis that attorney Gordon may have been misled by Riegel as to the fact of discrimination. This rationale is not only contradicted by the undisputed facts in the record, it still conflicts with the decisions of the other Circuits.

It is clear that the only thing *preventing* Meyer from filing in a timely manner was his attorney's error of legal judgment. Based on his own affidavit, it is undisputed that Gordon refrained from filing in January 1978 because of his misunderstanding as to the standard for filing. According to his affidavit, Gordon recommended against filing a charge of age discrimination in January 1978 because:

[T]here was at present no convincing evidence that [Meyer] had been selected for discharge because of his age and that it was doubtful that he could make out a prima facie case of age discrimination, especially since there was no evidence that his job had been taken by a younger employee, but instead had been eliminated in the context of a substantial reorganization of Riegel's salaried personnel positions. I told him that, unfortunately, suspicions, speculations, and subjective interpretations of Riegel's record of laying off employees were not enough on which to base an age discrimination claim. . . . I suggested that he try to discover further evidence bearing on his suspicion and if he discovered any to bring it to my attention immediately. ⁴⁶

Gordon made the decision to delay filing despite Meyer's allegations about incriminating statements made by his

⁴⁵ *Link v. Wabash Railroad Co.*, 370 U.S. 626, 633-34 (1962).

⁴⁶ R. 254-55.

supervisor with respect to the discriminatory basis for his discharge, as well as Meyer's allegation that Riegel had a past practice of laying off older employees in reductions in force.⁴⁷ Gordon claims he delayed in part because "there was no evidence" that a younger person had taken Meyer's job. The Third Circuit, however, held in *Bonham v. Dresser Industries, Inc.*,⁴⁸ "We do not believe that a complaint of age discrimination will always require proof that the discharged person was replaced by a younger employee; it is enough that he was discharged because of his age."

Gordon's affidavit undisputably shows that the delay in filing in January 1978 was due to his belief that Meyer needed to have proof of a prima facie case of age discrimination in order to file a charge. This was a clear mistake of law. While Meyer would have the burden of showing a prima facie case at trial after having full discovery under the Federal Rules of Civil Procedure, such evidence is not required for filing a charge. It is the agency's role to use its statutory investigative power, after a charge is filed, to determine whether there was reasonable cause to believe that discrimination occurred. Meyer cannot assert equitable tolling for delay caused by his attorney's misunderstanding or mistake of law.⁴⁹

Moreover, Meyer's admissions in the record make it clear that the additional facts Gordon desired would only have buttressed his existing "suspicion" of discrimination. The confirmation of his suspicion which attorney Gordon desired is not legally relevant for purposes of tolling. For example, in *Hart v. J. T. Baker Chemical Corp.*,⁵⁰

⁴⁷ *Id.*

⁴⁸ 569 F.2d 187, 195 (3rd Cir. 1977), cert. denied, 439 U.S. 821 (1978).

⁴⁹ See *Link v. Wabash Railroad Co.*, 370 U.S. 626, 633-34 (1962). See also *Quina v. Owens-Corning Fiberglas Corp.*, 575 F.2d 1115, 1118 (5th Cir. 1978).

⁵⁰ 598 F.2d 829 (3rd Cir. 1979).

the plaintiff filed an untimely sex discrimination charge. Although the employer had given her a nondiscriminatory explanation for her discharge, she nevertheless suspected that the discharge was related to her sex. The District Court rejected her claim that the filing period should be tolled until she obtained evidence of discrimination. The Court of Appeals affirmed, holding that plaintiff's suspicions of discrimination were sufficient to lead a "reasonable person" to take further action.⁵¹

Certainly Gordon cannot be held to a lower standard than the plaintiff in *Hart*, who was not represented by an attorney. As an attorney, Gordon is presumptively aware of the investigative powers of the Department of Labor and the availability of discovery in litigation. Had Gordon filed a charge when Meyer came to him about suspected age discrimination, the additional facts Gordon wanted, if they existed, would presumably have come to light in a resulting investigation; they certainly could have been discovered under the Federal Rules of Civil Procedure before he had to make out a prima facie case at trial.

Moreover, the transparency of any claim that Gordon's delay was due to his being misled by Riegel is confirmed by Gordon's failure to provide any explanation why neither he nor Meyer took any action from January 1978 until May 1978 to attempt to gather the additional evidence Gordon claims he needed. Nor is there any explanation why, when Gordon became satisfied in May 1978 that he had the evidence he needed and filed an untimely charge with the state agency, he nevertheless sat on his client's ADEA rights and waited until September 22, 1978, to submit the same allegations of discrimination to the Department of Labor.

The Third Circuit ignored Gordon's mistakes and allowed tolling even though Meyer retained Gordon as his

⁵¹ *Id.* at 834.

attorney early in the filing period. The ruling is erroneous and conflicts the decisions of other Circuits. This Court should resolve this conflict in the Circuits and hold that an ADEA plaintiff who retains counsel to protect his rights during the filing period may not claim equitable tolling and escape the consequences of his attorney's errors.

(c) The Decision of the Third Circuit Conflicts With the Principles Announced by This Court in Its Recent Employment Discrimination Decisions

Although this Court has not spoken directly to the issue of equitable tolling under the ADEA, it has established principles in its recent decisions on limitations periods in employment discrimination cases with which the Third Circuit's opinion conflicts. Accordingly, a writ of certiorari should be granted under Rule 17.1(c) of the Rules of this Court, since the court below "has decided a federal question in a way in conflict with applicable decisions of this Court."

Since 1976, this Court has decided three important cases that are material to the tolling issue presented here: *Zipes v. Trans World Airlines, Inc.*,⁵² *Delaware State College v. Ricks*,⁵³ and *Electrical Workers v. Robbins & Meyers, Inc.*⁵⁴ Although these cases do not specifically hold that ADEA limitations periods are subject to equitable tolling, they suggest that under certain circumstances tolling may be appropriate. Those circumstances are not presented here.

In *Ricks*, the Court held that the limitations period for discrimination claims begins to run when the employment decision is made and clearly communicated to the em-

⁵² 455 U.S. 385 (1982).

⁵³ 449 U.S. 250 (1980). See also *Chardon v. Fernandez*, 454 U.S. 6 (1981).

⁵⁴ 429 U.S. 229 (1976).

ployee. This Court rejected arguments for delaying commencement of the filing period until an appeals procedure had been exhausted or until employment had ended. Thus, the operative fact of which a plaintiff must be aware for the filing period to run is the employment action itself.

In *Electrical Workers*, the Court left open the possibility of tolling the statute of limitations in certain limited cases. While the Court rejected the argument that the time limits under Title VII should be tolled during the pendency of a grievance-arbitration procedure, it indicated when tolling might be appropriate:

In no way is this a situation in which a party has "been prevented from asserting" his or her rights, *Burnett v. New York Central R. Co.*, 380 U.S., at 429. There is no assertion that Guy was "prevented" from filing a charge with the EEOC within 90 days of October 25, 1971; indeed, it is conceded and even urged that she could have filed it the following day, had she so wished.⁵⁵

In *Zipes* this Court confirmed that statutory filing periods under Title VII are not "jurisdictional" and may be tolled where equity requires.

The clear mandate of *Ricks* and *Electrical Workers* is that an employee who is notified of a final decision to terminate his employment must act promptly to assert his rights under the procedures and within the time limits established by Congress. The key event is the alleged act of discrimination, and subsequent events that do not prevent the plaintiff from filing a charge, even though they may lead to a reversal of the act of discrimination, do not affect the running of the limitation period.

In this case, Meyer claimed no misunderstanding about his employment status; he conceded that he received a final notice of discharge on November 11, 1977. Meyer

⁵⁵ 429 U.S. at 237 n.10.

knew his discharge was permanent, and he suspected from that day on that he was being discriminated against on account of his age. Moreover, Meyer was aware of the ADEA. It is undisputed that an official Department of Labor notice of the rights and filing procedures under the ADEA was posted within 12 feet of the entrance to Meyer's department.⁵⁶ In sum, the undisputed facts in the record show that, to paraphrase footnote 10 in *Electrical Workers*, there was nothing that prevented Meyer from filing a charge the day after his termination was announced, had he wished to do so.⁵⁷

The Court of Appeals focused its finding of support for tolling on Riegel's letter of January 13, 1978, which Meyer received more than two months after the date the limitation period began to run under *Ricks*. Meyer does not contend that the letter led him to believe that his employment might not have been finally terminated, nor that it delayed his taking action because Riegel implied he might get his job back. The Court of Appeals erred by finding that a "misrepresentation" or "concealment" of the reason for his discharge, as opposed to the fact of his discharge, could toll the limitation period. Neither the common law nor the opinions of this Court suggest that the employer's assertion, or lack of assertion, of the reason for the discharge bears any relation to commencement or tolling of the ADEA filing period when the employee is admittedly aware that he has been discharged.⁵⁸

⁵⁶ R. 57. The notice stated in part, "If you feel you have been discriminated against because of age, contact the nearest office of the Wage and Hour Division, U.S. Department of Labor. It is important to contact the Division promptly." R. 59-60.

⁵⁷ See *Electrical Workers v. Robbins & Myers, Inc.*, 429 U.S. 229, 237 n.10 (1976).

⁵⁸ In finding that Riegel's alleged concealment of a discriminatory motive for discharging Meyer justified tolling, the Court of Appeals misconstrued a Second Circuit decision that suggested in dicta

The Court's focus in *Ricks* on the date when the employee is notified of the termination decision provides the proper framework for considering an equitable tolling claim. If the notice of termination is confusing or misleading as to whether the employee is in fact terminated, or if the employee is led to believe he might be rehired if he refrains from filing a charge, the employee might delay filing because he is unsure that the employer has actually made a final decision to end his employment. Under those circumstances, tolling could be appropriate. The *Ricks* rationale does not, however, suggest that equitable tolling is proper when an employee who knows he has been terminated is uncertain whether to file a charge because the employer has not told him that its reason for terminating him was discriminatory. The operative fact of which plaintiff must be aware for the limitations period to run is the employer's decision to terminate, not the employer's motivation for the decision.

Moreover, the Court of Appeals' rationale conflicts with this Court's statements about tolling in *Electrical Workers*. This Court made it clear that a tactical decision to pursue an alternate remedy rather than file a charge

that equitable tolling might be appropriate when "the defendant had actively misled the plaintiff respecting the cause of action." *Smith v. American President Lines, Ltd.*, 571 F.2d 102, 109 (2d Cir. 1978). The *Smith* decision relied on Note, *Developments in the Law-Statutes of Limitations*, 63 HARV. L. REV. 1177 (1950) for the proposition that allowing equitable tolling where the defendant misled the plaintiff as to his cause of action "would be consistent with common law tolling principles". 571 F.2d at 109 n.12. The Note pointed out, however, that under normal common law principles, "mere suppression of evidence relevant to a known cause of action is probably not sufficient" for tolling, and that "a mere denial of liability . . . does not constitute concealment within the meaning of the exception [to statutes of limitations]". 63 HARV. L. REV. at 1221. In any event, under *Electrical Workers*, tolling would be appropriate only where the plaintiff was "prevented from asserting" his claim in a timely manner.

cannot be a basis for tolling.⁵⁹ Similarly, the Court of Appeals erred in holding that Meyer can assert tolling where he elected to consult a lawyer to pursue his suspicion of age discrimination, rather than to file a charge with the Department of Labor. As this Court stated in footnote 10: "[i]n no way is this a situation in which a party has 'been prevented from asserting' his or her rights, *Burnett v. New York Central R. Co.*, 380 U.S., at 429." ⁶⁰

In *Burnett*,⁶¹ this Court pointed out that the basic question to be answered in determining whether to toll a limitations period is "whether congressional purpose is effectuated by tolling the statute of limitations in given circumstances".⁶² Congress' purpose as reflected in the statutory scheme of the ADEA is that there must be a prompt charge of discrimination which notifies the employer of the complaint, provides an opportunity for prompt remedial action and signals the responsible agency of the onset of its statutory duties of investigation and conciliation.⁶³ It is the agency's responsibility to investigate the charge, make a determination of probable violation of the Act and attempt conciliation. Meyer's delay while he was told by his attorney to conduct his own investigation rather than contact the Department of Labor was not only inappropriate, it hampered chances for prompt investigation and may have prevented informal resolution by the Department of Labor.⁶⁴

⁵⁹ 429 U.S. at 236-40.

⁶⁰ 429 U.S. at 427.

⁶¹ 380 U.S. 424 (1965).

⁶² *Id.* at 427.

⁶³ *Bihler v. Singer Co.*, 710 F.2d 96, 99 (3rd Cir. 1983).

⁶⁴ See *Dartt v. Shell Oil Co.*, 539 F.2d 1256 (10th Cir. 1976), *aff'd by equally divided Court*, 434 U.S. 99 (1978) (purpose of time limitation is to achieve conciliation while the complaint is still fresh).

As this Court noted in *Ricks*, "It should not be forgotten that time-limitations provisions themselves promote important interests; 'the period allowed for instituting suit inevitably reflects a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones.'"⁶⁵ The Third Circuit's opinion frustrates, rather than effectuates, Congress' value judgment and the protection Congress provided for defendants when it adopted the limitations period in the ADEA.

CONCLUSION

For the reasons stated in this Petition, the writ of certiorari should be granted and the decision of the Third Circuit reversed.

Respectfully submitted,

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⁶⁵ 449 U.S. at 259-60 (quoting *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 463-64 (1975)).

APPENDICES

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil No. 80-47

JOSEPH W. MEYER,

v.

Plaintiff,

RIEDEL PRODUCTS CORPORATION, *et al,*

Defendants.

TRANSCRIPT OF PROCEEDINGS

Newark, New Jersey

May 24, 1982

BEFORE:

HONORABLE VINCENT P. BIUNNO, U.S.D.J.

Appearances:

HOROWITZ, EROSS, SININS, IMPERIAL & MEDVIN, ESQS.,
By: PHILIP ELBERG, ESQ.,

and

MITTLEMAN & GORDON, ESQS., (D.C.)
By: MICHAEL GORDON, ESQ.,
For the Plaintiff

SHANLEY & FISHER, ESQS.,
By: CHARLES A. REID, III, ESQ.,

and

KELLY, DRYE & WARREN, ESQS., (NY)
By: NED H. BASSIN, ESQ.,
For the Defendants

* * * *

[41] THE COURT: All right. The record on the motion is clear and undisputed that Mr. Meyer was informed of his discharge at least as early as November, 1977. It is that date that controls the running of the time within

which to file his state charges in a deferral state and with the appropriate [sic] federal agency.

The time period set in the federal statute are 180 days for the state charge and 300 days for the federal. The controlling date is not the last day of work, or some day when he received a letter stating the official reason or the basis asserted for a fact discharge.

The statute giving rise to a charge deals with the act of discrimination, and that act, if it occurred at all, occurred on November 11, 1977 and not thereafter.

The federal filing on September 26, 1978, is thus 19 days late, not one day late, and not within time.

[42] There is no dispute about the facts upon which the plaintiff relies for equitable tolling. Those facts show no legal basis for equitable tolling for the filing period.

Mr. Meyer's own statements in his verified complaint, in his affidavits, in his deposition, consistently showing that he felt he had been the subject of age discrimination from the state, from the day he was told that he was to be terminated effective November 25.

Whatever value there may be in delaying filing until more is learned in order to have a stronger claim, this Court can only be safely pursued in light of the time limit, which, to be prudent [sic], should be calculated with care and conservatively.

Filing on what is thought to be the last day is always risky. The calculation may be wrong, as it was here.

Any other view of the circumstances would imply that time does not start to run until the claimant has successfully gathered all the facts he believes will prove his case. This would not only destroy the significance of a time limit, but would allow the time to run indefinitely at a pace measured by the plaintiff's diligence and success.

Discovery is a process that follows charges [43] rather than precedes them. The filing was well out of time. The factual details provided no support for equitable tolling.

Summary judgment for defendants is called for on account of that fact on the federal claim. It is therefore

unnecessary to deal with the motion for summary judgment going to the merits of the charge.

The previous order of August 4, 1981, that the claim based on state law is dismissed, will stand.

New Jersey Statute NJSA 10:5-27 provides that the administrative proceeding is to be exclusive while it is pending. Papers on the motion show the state proceeding is still pending.

Under 28 U.S. Code Section 1738, this Court must give the New Jersey Statute the same full faith and credit that statute would have by law in the Superior Court, and so this claim cannot be sustained.

In view of these two dispositions, no ruling is needed on the question of in personam jurisdiction over James River or as to the propriety of the affidavit filed June 8, 1981.

On the question of attorney's fees, the usual rule is that they are not allowed unless there is a statutory basis. Cases cited deal with situations where the Supreme Court has identified rare or exceptional [44] circumstances where fees have been allowed in the absence of statutory authority as part of the inherent power of the Court. This case does not appear to fall within any of them.

The Court also notes that the ADEA draws in a provision of the Fair Labor Standards Act which does contain a provision for attorney's fees, but that provision is limited to fees to the plaintiff as part of his recovery. It does not provide for fees to a defendant who successfully defends.

However, assuming the Court has some authority from some source to award attorney's fees in a case of this kind, it exercises its sound discretion in that event by denying the allowance.

Submit an order in accordance with those rulings. I suggest you have the Court Reporter prepare a transcript of the ruling, the last portion.

APPENDIX B

UNITED STATES DISTRICT COURT
Room 411, U.S. Post Office Building
Newark, New Jersey 07102
FTS (8) 341-2517

VINCENT P. BIUNNO
Judge

(201) 645-2517
(201) 642-2451

ORDER

Re: Meyer v. Riegel Products Corp. et al., Civ. 80-47

It Appearing that the parties have been unable to agree on a form of order embodying the ruling made from the bench at the hearing of May 24, 1982, transcript of which was filed June 28, 1982,

It is, on the 29th day of September, 1982, ORDERED THAT"

1. Summary judgment is entered against plaintiff and in favor of defendants on the claim asserted under the Age Discrimination in Employment Act (ADEA);

2. The previous order of August 4, 1981, dismissing the State law claim will remain in force;

3. Defendants' application for attorneys' fees is denied;

4. Costs to defendants are to be taxed by the Clerk.

/s/ Vincent P. Biunno
VINCENT P. BIUNNO
USDJ

Orig. to clerk

Copy to Philip Elberg, Esq.,

Charles A. Reid, III, Esq.

[Filed Sep 30, 1982]

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-5770

MEYER, JOSEPH W.,
Appellant
v.

RIEGEL PRODUCTS CORPORATION and
JAMES RIVER CORPORATION OF VIRGINIA

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY—NEWARK
(D.C. Civil No. 80-00047)

Argued September 15, 1983
Before: SEITZ, *Chief Judge*,
GIBBONS and ROSENN, *Circuit Judges*
Opinion Filed November 2, 1983

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On the Brief:

W. Carter Younger, Esq.
Mark W. Lynch, Esq.

OPINION OF THE COURT

ROSENN, *Circuit Judge*

This case requires us to clarify a critical question concerning the doctrine of equitable tolling in a case charging a violation of the Age Discrimination in Employment Act. Because we believe the district court erred in concluding that as a matter of law plaintiff failed to allege facts that, if proven at trial, could compel a court to equitably toll the applicable statute of limitations, we reverse and remand for trial.

I.

In late 1977 plaintiff Joseph W. Meyer, then a sixty-one year old resident of Bucks County, Pennsylvania, was employed by defendant Riegel Products Corporation, Inc. (Riegel), a New Jersey manufacturer of specialty paper. Plaintiff had been employed by Riegel for approximately thirty years, attaining the position of Environmental Control Supervisor. His duties encompassed two distinct

jobs: responsibility for effluent water quality and air pollution control at three of Riegel's New Jersey mills and supervision of a project engineering group covering mechanical, structural, survey, and process assignment in connection with all four of Riegel's New Jersey mills. At the time the events of late 1977 transpired, plaintiff's salary was \$22,412. He had recently been promoted on July 6, 1977, and his employer did not seem to have been in any way displeased with plaintiff's job performance.

On September 18, 1977, James River Corporation of Virginia (James River), a holding company, had acquired Riegel. Despite contemporaneous assertions leading Riegel employees to believe the contrary, James River in discussions with Riegel management immediately preceding the acquisition expressed plans to dismiss some of Riegel's salaried personnel once the acquisition had been completed. Not surprisingly, therefore, rumors of layoffs began to spread among Riegel employees. On or around November 11, supervisor Robert Swick informed plaintiff that the axe had fallen on him and that he was dismissed effective November 25. Swick added that plaintiff has been the recipient of "a real screwing." Shortly before this notice of dismissal, plaintiff had a conversation with fellow employee Ralph Fisher, who observed that Riegel's older salaried employees had reason to be worried. This conversation, and supervisor Swick's remark as to plaintiff's "real screwing," dovetailed with the pervasive belief among employees that Riegel traditionally exploited older workers. At the time of his dismissal, in short, plaintiff had reason to suspect—and in fact did suspect—that age had played a role in Riegel's decision to let him go four years before he would be entitled to full pension benefits. On November 25 plaintiff worked his last day as a Riegel employee.

Several weeks later, plaintiff wrote to Riegel's Director of Personnel, seeking to ascertain both the reason for his

discharge and the status of his pension benefits. At approximately the same time plaintiff mentioned to his daughter his desire to obtain legal advice, and she referred him to Michael Gordon, a Washington attorney who specializes in pension law.

On January 13, 1978, Director of Personnel Griffith replied to plaintiff's inquiry in a letter informing Meyer, among other things, that he had been dismissed "when the Engineering Department was reorganized due to the acquisition of Riegel Products Corporation by the James River Corporation." At approximately the same time this letter was written, defendant Riegel interviewed and hired Thomas E. Linder, Jr., a twenty-eight year old graduate of the University of Maine with a degree in Biology and Chemistry. Linder began work on February 13, 1978.

Throughout January 1978 plaintiff and attorney Gordon had conversations with each other regarding pension benefits, and also discussed the age discrimination issue. In February, after reviewing the information forwarded him by plaintiff, Gordon informed Meyer that it was doubtful they could make out a *prima facie* case of age discrimination. Accordingly, Gordon suggested that plaintiff seek to uncover evidence that might confirm his suspicions, and advised plaintiff to inform him of the results of that endeavor.

On or around May 1, 1978, plaintiff learned from a newsclipping sent him by a former Riegel employee that Thomas E. Linder, Jr., had been hired by Riegel to assume many of the environmental tasks plaintiff had performed. Plaintiff sent the clipping to Gordon, who informed him that in his judgment the basis for an age discrimination suit now existed and that he would therefore file a complaint with the appropriate New Jersey agency. On May 25, 1978, Gordon filed such a complaint with the New Jersey Division of Civil Rights. On Sep-

tember 22, 1978, Gordon then sent the required charge letter to the United States Department of Labor, which received it on September 26. The Department assumed jurisdiction over the charge and held a conciliation conference on March 19, 1979. Defendants declined to conciliate, however, purportedly because of the pendency of the New Jersey investigation.

On December 1, 1978, defendant Riegel filed an answer to the New Jersey complaint, alleging that plaintiff had been dismissed not because of the impending reorganization but because he was incompetent. The answer went on to suggest that James Griffith had used the "reorganization" justification as a way to spare plaintiff's feelings, ease his search for a new job, and make him eligible for severance pay. This allegation of incompetence, coming more than a year after plaintiff's dismissal, appears to have been the first indication that his job performance left anything to be desired. Evaluation forms filled out by plaintiff's superiors, for instance, reveal that they had been quite pleased with Meyer's performance.

In an April 1981 deposition for this action, Personnel Director Griffith offered yet another explanation of the dismissal: plaintiff, he maintained, had not been qualified to handle an environmental control job that Griffith contemplated creating during the time that James River was negotiating to acquire Riegel. The Company, Griffith said, had needed someone "aggressive," someone "vigorous," someone with a background that could handle chemical problems at some of the mills. Such an explanation had never before been mentioned to plaintiff. Nor had it been mentioned in the answer filed in the New Jersey proceedings. Sometime in 1979, after filing his charge letter with the Department of Labor, plaintiff learned from supervisor Swick that in May 1978 Riegel had also hired a much younger employee in the Engineering Department to assume project engineering duties essentially the same as those for which plaintiff had been responsible prior to his discharge.

On January 7, 1980, plaintiff brought suit against defendants Riegel and James River in the United States District Court for the District of New Jersey. Count one of the complaint asserted claims for unpaid and lost wages and overtime compensation under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-634 (1976). Count two asserted claims for compensatory and punitive damages for severe emotional distress under New Jersey law. The pretrial order filed July 29, 1980, amended count one to include a complaint for compensatory and punitive damages for severe emotional distress under the ADEA.

On May 1, 1981, defendants filed a five-part motion requesting the court to dismiss and/or grant summary judgment on the different counts for a variety of reasons. On June 22, the judge agreed to dismiss count two on the ground that it failed to state a claim on which relief could be granted or, in the alternative, on the ground that the court should decline to exercise pendent jurisdiction. The court also struck plaintiff's prayer for compensatory and punitive damages for severe emotional stress under the ADEA, and the prayer for unpaid overtime compensation.

On May 24, 1982, the court held oral argument on defendants' remaining motions. In a bench ruling issued at the conclusion of the argument, the judge granted defendants' motion for summary judgment with respect to count one on the ground that plaintiff had failed to file a timely charge with the Department of Labor before bringing suit. The court observed that the 300 day limitation period for the filing of a charge with the Secretary of Labor began to run on November 11, 1977, the date on which plaintiff had been informed of the dismissal. The court further noted that the charge could not be considered to have been filed until September 25, 1978, the date on which the Department of Labor received it. It therefore concluded that the filing occurred

319 days after the act of discrimination took place. In arriving at this conclusion, the court explicitly rejected plaintiff's plea to invoke the doctrine of equitable tolling, noting that "Mr. Meyer's own statements . . . consistently [showed] that he felt he had been the subject of age discrimination . . . from the day he was told that he was to be terminated." Plaintiff thereupon appealed.

II.

In *Bonham v. Dresser Industries, Inc.*, 569 F.2d 187 (3d Cir. 1977), we concluded that the filing requirements of the ADEA could best be characterized as a statute of limitations rather than a jurisdictional prerequisite to suit. The important humanitarian purposes of the legislation led us to decide that the limitation requirements of the Act may in appropriate instances be subject to tolling or estoppel. 569 F.2d at 192-93. Accordingly, plaintiff's failure to file a timely charge with the Secretary of Labor does not serve to deprive us of jurisdiction. *Accord Dartt v. Shell Oil Co.*, 539 F.2d 1256 (10th Cir. 1976), *aff'd per curiam by an equally divided court*, 434 U.S. 99 (1977). Thus, nothing in the statute precludes us from equitably tolling the limitation period.

The case law pertaining to equitable tolling has proliferated rapidly in the past few years. In this appeal, therefore, each side sets forth numerous cases that it claims can plausibly be read to support the spirit of its position. Each side, moreover, makes the most of such cases. A careful analysis of the applicable case law, however, sheds considerable light on this troublesome question.

Although time limitations prescribed by Congress must be treated seriously, in *School District of Allentown v. Marshall*, 657 F.2d 16 (3d Cir. 1981), this court observed that among the principal situations in which equitable tolling is appropriate is where ". . . the defendant has

actively misled the plaintiff respecting the cause of action." *Id.* at 20, quoting *Smith v. American President Lines, Ltd.*, 571 F.2d 102, 109 (2d Cir. 1978), in which the Second Circuit interpreted the Supreme Court's most recent discussion of equitable tolling in *Electrical Workers v. Robbins & Meyers, Inc.*, 429 U.S. 229 (1976). The discussion in *School District of Allentown* reaffirmed our declaration in *Bonham v. Dresser Industries, Inc.*, 569 F.2d 187, 193 (3d Cir. 1977), that "cases may arise where the employer's own acts or omissions have lulled the plaintiff into foregoing prompt attempts to vindicate his rights."

Defendants do not here deny the continuing vitality of this legal principle. Rather, they contend, first, that none of their statements—however false or deceptive—can be said to have induced plaintiff into failing to forthrightly file his claim and, second, that both plaintiff's lingering suspicions concerning his dismissal and his consultations with an attorney themselves preclude the invocation of equitable tolling. We deal with these contentions seriatim.

A.

Defendants correctly remind us that any alleged misrepresentations made to plaintiff subsequent to September 22, 1978, the date on which he sent off the charge letter to the Department of Labor, could not have misled him vis a vis the filing of the charge.¹ Such a contention, however, is by definition inapplicable to Griffith's letter of January 13, 1978, informing plaintiff that he was dismissed "when the Engineering Department was reorganized." Nor does it apply to defendant James

¹ Such (mis)representations, however, could have substantial effect on the factfinder's assessment of defendants' credibility. For even if deceptions that occur late in the game themselves fail to play a role in the outcome, their very presence could fuel pre-existing skepticism about the way in which the game was conducted.

River's alleged surreptitious plan to replace plaintiff with a younger employee. Given plaintiff's allegations, either of these phenomena—viewed in a light most favorable to plaintiff²—could have caused him to temporarily defer filing with the Department of Labor. Accordingly, defendants' claim that as a matter of law all their representations elude the principle of *Bonham* and *School District of Allentown* will not wash.

Further, their contention that only "egregious acts of active deception" can toll the limitation period has no support in the law. We are directed to no case in which a court has used a tape measure to determine the magnitude of a potential misrepresentation and has then held that a big one tolls but a little one does not. *See Price v. Litton Business Systems, Inc.*, 694 F.2d 963, 965 (4th Cir. 1982) (tolling appropriate if employee's failure to file results from "a deliberate design by the employer or [from] actions that the employer should unmistakably have understood would cause the employee to delay filing his charge.") Even were we to gauge the measure of the alleged misrepresentations in this case, moreover, we would be forced to accept plaintiff's allegation that they were weighty. We could not do otherwise on review of a grant of summary judgment for defendant.

In sum, plaintiff has surmounted his initial hurdle: alleging acts that, taken as alleged, could persuade a court to activate the doctrine of equitable tolling.

B.

The precise issue before us, then, reduces to whether equitable tolling is inappropriate here because plaintiff has either (a) entertained suspicions that his dismissal

² In determining the existence of a disputed issue of material fact on a motion for summary judgment, all inferences, doubts, and issues of credibility should be resolved against the moving party. *Smith v. Pittsburgh Gage & Supply Co.*, 464 F.2d 870, 874 (3d Cir. 1972).

was a function of discrimination or (b) discussed the problem with an attorney.³

1.

The district court rested its disposition of the case on the proposition that a court may not invoke the doctrine of equitable tolling when plaintiff had entertained suspicions about the legality of the dismissal at the time it occurred. On appeal, defendants rely on the same argument. The only case they cite for this specific proposition, however—*Hart v. J.T. Baker Chemical Corp.*, 598 F.2d 829 (3d Cir. 1979)—differs in important ways from the case before us.

In *Hart*, plaintiff-employee suspected at the time of her dismissal that gender may have played an operative factor in the discharge. She did not file the required charge letter, however, until 477 days after the discriminatory act allegedly took place. The applicable limitation period had been 180 days. In affirming the district court's rejection of the equitable tolling claim, we noted that "the facts upon which her charge was predicated were known to her on the date of the discharge." 598 F.2d at 834. In short, plaintiff simply did not allege that defendant had anything to do with her untimeliness. The court observed that, had plaintiff inquired into the reasons for her dismissal and then alleged that she had been deceived, an entirely different issue would have been presented. Here, however, plaintiff Meyer alleges precisely what the plaintiff in *Hart* failed to allege: that defendants deceived him into postponing the filing of a claim. Here, too, plaintiff did precisely what the *Hart* court suggests: he asked defendants for an explanation of his dismissal. Thus, *Hart* cannot be read to support the proposition that contemporaneous suspicion itself pre-

³ Defendants also argue that the failure to timely file was due to the inadvertence of plaintiff's counsel, an allegation that counsel denies, which we regard as irrelevant on this appeal.

cludes the invocation of equitable tolling, and the district court erred in uncritically anchoring its grant of summary judgment in this nonexistent principle. *See Richards v. Mileski*, 662 F.2d 65 (D.C. Cir. 1981) (suit by employee who had been forced to resign in 1955 under false charges of homosexuality and who did not discover until 1978 that federal agents had spread false reports of his homosexuality was not barred on limitations ground even though plaintiff knew in 1955 that the charge was groundless).

2.

Defendants cite numerous cases from a wide range of courts, including this one, to support the proposition that equitable tolling may not be invoked in a situation in which plaintiff has consulted a lawyer. Nevertheless, the cases themselves do not support a proposition quite that broad. Rather, they for the most part stand for the laudable notion that a plaintiff who has consulted with an attorney about a potential discrimination claim will not get away with complaining that he failed to understand the requirements and implications of the statute. Unlike plaintiffs in those cases, plaintiff here does not base his argument for equitable tolling on ignorance of law. He instead asks us to toll the limitation period because defendants painted a picture so distorted of the ground for his dismissal that the merits of the potential claim remained obscure for a considerable length of time.

No case cited by defendants impels us to reject this request. In fact, at least three cases cited by defendants suggest that where misrepresentation occurs tolling represents an appropriate corrective mechanism, irrespective of the fact that plaintiff sought legal advice. *Bonham, supra*, 569 F.2d at 193; *Maira v. Hooker Chemical and Plastics Corp.*, 26 F.E.P. 254, 256 (W.D.N.Y. 1981); *Bronze Shields Inc. v. New Jersey Department of Civil Service*, 667 F.2d 1074, 1085 (3d Cir. 1981). Plaintiff persuasively contends that these suggestions indicate that

where a defendant misleads a plaintiff he may also mislead plaintiff's lawyer, and in such a case the alleged fraud supersedes the results that ordinarily flow from consultation with an attorney. Such an interpretation of the case law seems to be precisely what we had in mind in *Bonham*, in which plaintiff had secured counsel, when we nevertheless remarked that "cases may arise where the employer's own acts or omissions have lulled the plaintiff into foregoing prompt attempts to vindicate his rights." 569 F.2d at 193. Such an interpretation also makes sense of the formal standards for equitable tolling we set out in *Marshall*, *supra*, 657 F.2d at 20. Indeed, perhaps the reason defendant has failed to cite any case in which a court permitted consultation with counsel to negate an allegation of employer deception is that such a holding would be both strikingly inconsistent with the purposes of the antidiscrimination statutes and completely devoid of common sense.

III.

Our disposition of this case intimates nothing about our views with respect to either the merits of the underlying age discrimination claim or the question of whether plaintiff can in fact prove at trial that any misrepresentation or omission of defendants had an important effect in causing him to postpone filing the charge with the Department of Labor. We hold only that there exist genuine issues of material fact to be resolved before a proper determination of the equitable tolling claim can be made. The district court's grant of summary judgment regrettably shortcircuited the pursuit of such facts.

The judgment of the district court will be reserved and the case remanded for trial.

A True Copy:

Teste:

*Clerk of the United States Court of Appeals
for the Third Circuit*

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-5770

JOSEPH W. MEYER,
v. *Appellant*

RIEGEL PRODUCTS CORPORATION and
JAMES RIVER CORPORATION OF VIRGINIA
(D.C. Civil No. 80-00047—D.N.J.—Newark)

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge*, ALDISERT, ADAMS, GIBBONS,
HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVI-
TER, BECKER, and ROSENN, *Circuit Judges*.

The petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ Collins J. Seitz
COLLINS J. SEITZ
Chief Judge

Dated: Nov. 29, 1983

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

December 7, 1983

No. 82-5770

JOSEPH W. MEYER,

vs.

Appellant

RIEDEL PRODUCTS CORPORATION and
JAMES RIVER CORPORATION OF VIRGINIA

Present: SEITZ, *Chief Judge*; GIBBONS and ROSEN, *Circuit Judges*

1. Motion by Riegel Products Corporation, Inc. and James River Corporation of Virginia for motion to stay the mandate which the Court may wish to treat as a Motion for Recall of Mandate.
2. For your information the the Opinion was filed and judgment entered on November 2, 1983. The Order denying petition for rehearing in banc was filed November 29, 1983. The Certified Judgment in lieu of a formal mandate erroneously issued on December 1, 1983.

in the above-entitled case. Any Answer which would be due by December 15, 1983, will be forwarded upon receipt of same.

Respectfully,

/s/ [Illegible]
Clerk

CH
enc.

19a

The foregoing Motion is granted conditional on the filing of petition for certiorari with the Supreme Court of the United States no later than Jan. 6, 1984

By the Court,

/s/ Max Rosenn
Circuit Judge

Dated: December 16, 1983